IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 59 of 1983

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ALLARAKHA RASUL SHEKH - Appellant(s)
Versus
NARSING BAPUSING - Defendant(s)

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Appearance :
None for Appellant(s) : 1,MR AJ PATEL for Appellant(s) : 1.2.1
MR PM DAVE for Defendant(s) : 1,
MR SM BHATT for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 14/08/2006

ORAL JUDGMENT

1. The present Second Appeal is at the instance of

the defendant who could defeat the plaintiff before the trial court but lost in the appeal. The appeal has been admitted for hearing on the following substantial questions of law by order dtd.4/5/1983.

(i)Whether the documents Exhs.68 and Exh.72 entered into between the parties are the documents of sale or the documents of mortgage?
(ii)Whether the suit is maintainable in view of the provisions of the Gujarat Rural Debtor's Relief Act, 1956?

2. The undisputed facts are that on 9/6/1955 the plaintiff mortgaged 3 Acres and 11 Gunthas of land bearing Survey No.203 of Village Ghoghamba with the defendant. Thereafter, he had taken a loan on 23/2/1958 and created a further charge of the said loan amount on the property. On 9/5/1960, a document was executed between the parties. According to the plaintiff, the document was an Agreement-to-sell, but as the Sale did not materialise and as he was ready and willing to redeem his loan, therefore, he sent a notice to the defendant, but on defendant's

refusal to go for redemption, he had filed the suit.

3. The defendant while admitting the execution of the document dtd.9/5/1960, however pleaded that in accordance with the consent of the parties, the property was sold for a sum of Rs.2200.00 in favour of the defendant, the document was executed in accordance with the wishes of the parties and was signed at least by three witnesses. His further submission is that since 9/5/1960, his possession was that of a purchaser, though the document was unregistered and was not properly stamped. His further submission is that as he was exercising his right of ownership and his possession as an absolute owner which, was notoriously known to everybody, the suit of the plaintiff beyond 12 years from the date of the document i.e.9/5/1960 is barred by limitation. Various other questions were also raised by the defendant. The trial court cast many issues and after hearing the parties, came to the conclusion that the document dtd.9/5/1960 (Ex.68) is absolute sale,

the defendant since 9/5/1960 was in possession of the property and as he was exercising right of ownership, he has acquired rights by prescription i.e. he has become owner by adverse possession. On appeal, the learned first appellate court came to the conclusion that Ex.68 though was executed between the parties, it bears signature of the plaintiff, but there are material addition and deletion in the said document and therefore, the document could not be relied upon and in fact, the document was an Agreement-to-sell and not an absolute sale. Being aggrieved by the said judgement of the first appellate court, the defendant is in this Court.

4. Mr.Patel, learned counsel for the appellant craving my indulgence to the questions and document Ex.Nos.68 and 72 submitted that the document dtd.9/5/1960 evinces an absolute sale and the learned first appellate court was unjustified in examining the interpolations in Ex.68 without a plea from the side of the plaintiff. He also submitted that the suit was

not maintainable in accordance with the provisions of sec.11 of the Gujarat Rural Debtor's Relief Act, 1956, because the competent authority had recorded finding that the transaction between the parties was an absolute sale and was not a mortgage. He submits that the findings recorded by the competent authority under Gujarat Rural Debtor's Relief Act would operate as res-judicata and on this short ground, the suit deserves to be dismissed.

5. Mr.Shah, learned counsel on the other hand combating the said arguments, submits that the plaintiff had come out with the case of mortgage and he was not seeking a declaration that Ex.68 was not a sale. Therefore, the basic burden was upon the defendant to prove that a sale deed in its absolute form was executed in favour of the defendant and if the plaintiff demolishes the case of the defendant by leading evidence, then he is not required to seek a declaration. In relation to sec.11 of the Gujarat Rural Debtor's Relief Act, it was submitted that, that question has been thrown in the air for the first time at

the second appellate stage less realising that the plea of res-judicata is to be raised like any other plea, the parties against whom res-judicata is to be used as a sword, must be given notice of the same and the court must have an opportunity to look into the documents, jugements and the provisions of law. He submits that the first appellate court was justified in decreeing the suit and the present Second Appeal deserves to be dismissed.

6. It is not in dispute before me that prior to the alleged document dtd.9/5/1960, a transaction of mortgage was surviving between the parties. If the document dtd.9/5/1960 is scored out, then the plaintiff's suit would be within limitation as limitation for redemption would be 30 years. To put hindrance to the right of the plaintiff to seek redemption, the defendant says that super-imposing event dtd.9/5/1960 came into existence. It is not the plaintiff who is seeking relief of cancellation of the document nor the plaintiff is seeking a declaration that the document is not binding upon him, to

demolish and defeat the case of the plaintiff, the defendant in his written statement has submitted that because of writing dtd.9/5/1960, the defendant being in continuous, open and hostile possession, has become owner. The basic burden to prove that the document is credible and reliance can be placed upon it was on the defendant, the defendant was required to prove the genuineness of the document. If the document is not genuine and is proved to be worth rejection, then the parties admission that there was a mortgage transaction would bind the parties.

7. The document dtd.9/5/1968 has been scribed by one Laxmiram. He was produced as a witness. He has stated before the court that he is document writer and he knows that how a document is prepared; if the document is a simple document of Agreement-to-sell, then it is not required to be registered, but if the document is a complete sale deed, then it is required to be registered. He has also admitted in his cross-examination that if there is any addition or deletion or

scoring off in the document, then the same is required to be countersigned by the parties or at lease a note is required to be made at the foot of the document that certain corrections have been made in the document. He does not give any reason in the cross-examination for not performing his duty. One Rupsing Amarsinh, yet another witness of the defendant was also confronted with all these facts and the interpolations made in the document. He also admitted the fact that if the document evinces absolute sale, then it is required to be registered and if there are addition and deletion in the document then the document is required to be countersigned. He also fails to give any reason or cause which persuaded the parties not to observe the regular course. The document Ex.68 undisputedly is written by Laxmiram and the plaintiff has affixed his signature. At the place of addition and deletion, undisputedly there are no counter signatures. Prior to deletion and addition, the document was narrating that it has been

finalised between the parties that the properties would be sold to the defendant for a sum of Rs.2200.00, but after addition and deletion, the document reads that the property is sold to the defendant for a sum of Rs.2200.00.

8. So far as the question of pleadings are concerned, it is a trite law that if the defendant raises a defence, it is deemed to be denied by the plaintiff and he is not required to plead the denial specifically. It is also trite law that if the defendant raises any additional plea to defeat the plaintiff, then the defendant is required to prove his case by leading credible, cogent and clinching evidence. If the defendant fails in establishing his plea by leading reliable evidence, then such plea would be rejected and then the court would proceed to decide the merits of the matter. In the present matter, the plaintiff had come to the Court with the plea of mortgage and if the document dtd.9/5/1960 (Ex.68) is ignored as created / manufactured document, then the

mortgage survives and the suit of the plaintiff cannot be said to be barred by limitation.

9. So far as the question No.1 framed by this Court at the time of admission is concerned, it must be answered against the interest of the defendant. It must be held that the document dtd.9/5/1960 is not a document of sale. It is to be held further that there are interpolations in the said document which make the said document worth rejection.

10. So far as question of making out of a new case for the plaintiff by the appellate court is concerned, it must immediately be held that the questions were raised before the two courts below. The parties were alive to the pleadings and the defence, they lead evidence in support of their pleadings and attention of both the courts were invited to the document Ex.Nos.68 and 72 and therefore, it is wrong to say that the appellate court was making out a new case in favour of the plaintiff.

11. So far as question No.2 is concerned, it is not in dispute before me that there are no pleadings

to support the plea of non-maintainability of the suit and res-judicata, no issue was cast, documents were not produced before the trial court. Even before the first appellate court the questions were not raised and before this Court only the question has been raised, but no pleadings were brought into existence by submitting an application for amendment.

12. The question of res-judicata can assume importance if the Court deciding the case is competent to grant the relief which is sought in the subsequent suit. The Court of limited jurisdiction, if delivers a judgement within its jurisdiction, then the said finding would be binding between the parties in the future litigation, but competence of the first court to grant relief claimed in second suit must be proved. It has not been argued before me that the first appellate court could grant a decree of redemption. The competent officer under Gujarat Relief Debtor's Act has simply observed that the transaction between the parties was of a sale. That finding even otherwise would not

bind the Civil Court when the entire evidence is brought on record and the witnesses have been examined. Even on the first principle, I must agree with Mr.Shah that in absence of pleadings and document so also the issue and evidence, the plea of res-judicata cannot be allowed to be raised for the first time in the second appeal. The 2nd question is also answered against the interest of the defendant.

13. For the reasons aforesaid, the appeal deserves to and is accordingly dismissed with costs through out in favour of the plaintiff payable by the defendant. A decree be framed accordingly.

(R.S.GARG,J.)

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